No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TACOMA MILLWORK SUPPLY COMPANY, a partnership consisting of ANN DAVIS and R. T. DAVIS, JR., as Executors of the Estate of R. T. DAVIS, Deceased, R. T. DAVIS, JR., LLOYD DAVIS, HARRY L. DAVIS, GEORGE L. DAVIS, MAUDE A. DAVIS, MARIE A. DAVIS, RUTH G. DAVIS, HATTIE DAVIS TENNANT, and ANN DAVIS,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, et al,

Appellees.

ANSWERING BRIEF OF McCLINTIC-MARSHALL COMPANY

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Filed this.....day of March, 1923

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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AUTHORITIES CITED

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STATEMENT OF THE CASE

On February 28, 1920, the appellants, doing business as and hereinafter referred to as the Tacoma Millwork Supply Company, entered into three written contracts with the Scandinavian-American Building Company for the furnishing and installing of certain material in the new

building to be erected by the Building Company, in Tacoma, Washington.

One contract, Exhibit "A" to the answer of these appellants (Tr. pp. 190, *et seq*, and in evidence as Exhibit 151, Tr. p. 746) covered the interior millwork for this building, with the exception of the banking quarters on the ground floor. This contract, which during the trial was and will be hereinafter referred to as the material contract, called for the furnishing of this millwork for the lump sum of $65,000. Another contract, Exhibit "B" to the answer (Tr. p. 180 and in evidence as Exhibit 153, Tr. p. 763) covered the furnishing and installing of the exterior window frames, and transom sash for the ground floor banking quarters, which were agreed to be furnished for the lump sum of $1957, plus $171 for the labor of installing the material. This contract is known as the "bank quarters contract". The third contract, Exhibit "C" to their answer (Tr. p. 200 and in evidence as Exhibit 152, Tr. p. 758) covered the erection or installation in the building of the interior millwork called for by the material contract. This installation was agreed to be done for the lump sum of $30,000. This contract is known as the "erection contract".

These contracts resulted from certain written proposals which were submitted by these appellants and were received in evidence as parts of Exhibits 151, 152 and 153. We invite the court's

attention to the discrepancy between the original proposal for the millwork contract forming part of Exhibit 151 (Tr. p. 757), and the so-called carbon copy thereof, also received as part of said Exhibit 151 (Tr. p. 755), and suggest an examination of the original Exhibit which has been transmitted from the lower court. In this connection the court will note that the cross complaint of these appellants relies on the original proposal signed by R. T. Davis, Jr. (Cf. Tr. p. 179 with p. 757).

These contracts were all entered into on the same day, and as one transaction. Paragraph XVI of the original answer and cross complaint alleges with respect to them:

> "that the contract 'Exhibit C', being a contract for the erection of the two several characters of millwork hereinbefore referred to, as being manufactured under Exhibits A and B, attached hereto and made a part hereof, was entered into contemporaneously with the said other or remaining contracts, by these, your cross complainants, and formed and is a part of the consideration entering into the two remaining contracts, and was all one and the same transaction, each contract being a consideration for the entry into the other." (Tr. pp. 173, 174.)

This allegation is repeated or reiterated in paragraph XVI of the Amended or Supplemental Answer and Cross Complaint. (See Tr. p. 221.)

Each of these contracts contains the following provisions:

> "Although it is distinctly understood and agreed between the parties hereto that this contract is a whole contract and not severable or divisable, yet for the convenience of the contractor it is stipulated that payments shall be made as follows:" (Cf. Tr. pp. 182, 191, 202, 747, 759, 764)

> "ARTICLE V. The said contractor shall complete the several portions and the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz.: All the work aforementioned to be delivered and *put in place* so that the whole can be completed in ten (10) months from date of this contract, and to be delivered as fast as the building will permit." (Cf. Tr. pp. 183, 193, 203, 749, 759, and 764.)

In lieu of the italicized words "put in place" the word "erected" is used in the bank quarters and erection contracts.

> "ARTICLE XIV. And the Contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanic's claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract." (Cf. Tr.

pp. 187, 197, 208, 753, 758 and 763.)

"ARTICLE XX. All negotiations and agreements, oral or written, prior to this agreement, are merged herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except by the mutual consent of the parties endorsed herein in writing and duly executed." (Cf. Tr. pp. 189, 199, 754, 758, and 763.)

The work of preparing the materials for installation was undertaken at the factory of the appellants in Tacoma and when work upon the building was suspended due to the failure of the Scandinavian American Bank of Tacoma, on January 15, 1921, certain materials had been completely manufactured, ready for installation, others were partially complete, and still others had not yet been worked up. In addition certain of the materials, either wholly or partially manufactured, were stored at the appellant's factory. Others, for the appellants' convenience and to relieve the congestion at their factory, were by them stored in a down town warehouse. The relative stages of the work and the location of the material is indicated by Exhibit 154 (Tr. pp. 766, *et seq.*) Moreover certain of the work comprehended under the erection contract (Exhibit 152) which was originally intended to be done in the new building and after the delivery of the material there had been done in the appellants' factory or at its warehouse in an-

ticipation of the actual work of installation. *No work of installation had been done upon the premises liened upon, and no material delivered there except 691 window openings and 80 pieces of scaffold bucks.* (Tr. pp. 684 and 768, Exhibit E-1 Tr. p. 772.)

The appellants assigned error, first, because a lien was not allowed for all material the manufacturing of which had been wholly or partially completed, and irrespective of the question of delivery to the liened premises. (See Assignment of Error No. 1, p. 564.) No further statement of the facts is necessary on this point, since by this assignment is raised the question of law whether under the lien statutes of the State of Washington delivery is essential to the validity of a claim of lien.

The second Assignment of Error (Tr. p. 565) is based upon the refusal of a lien for the value of the labor performed on defendant's premises under the erection contract in preparing manufactured material for actual erection or installation. This also presents a question of law, namely: must the labor for which a lien is claimed, be performed on the premises against which the lien is sought?

The 4th Assignment of Error (Tr. p. 565) raises the question whether delivery of manufactured materials to the down town warehouse for storage, pending the time when the building company was ready for the same, was a sufficient delivery to support the lien. We have already

asserted that such storage was for the appellant's convenience. The facts warranting that conclusion are unequivocal.

The contracts all required the work to be delivered and either put in place or erected. (See Article V of each contract). The appellant recognized that this provision required delivery.

> "We did not agree to deliver any of it. The company was to accept delivery from us and it is obvious under the material contract that we did not have to put it in place. *We would deliver it to the building at the best.*" (Testimony of R. T. Davis, Tr. pp. 688, 689.) (Italics ours.)

The contracts further provided that the work was to be furnished and finished to the satisfaction, approval and acceptance of the architect, and that the owner, i.e., the Building Company, should not be in any manner "answerable or accountable for any loss or damage that shall or may happen to the said work, or any part thereof, or to any of the materials or other things done, furnished and supplied by the contractor, used and employed in finishing and completing the same." (Cf. Articles II and XVII, of the contracts, Tr. pp. 192, 198, 747, 753.) The material was not delivered to the building,

> "for the reason that there was no room for them there, and they would not permit us to put them on the building because it would

slow down the work, and for another reason if we put it on the building, there being no roof, it would be the same as putting it in the street. It would be raining, and the stuff would be ruined. " (Testimony R. T. Davis, Jr., Tr. p. 678; Cf. Tr. p. 708.)

It will be borne in mind that the contract specifically called for delivery or erection "as fast as the building will permit", and that pending acceptance by the architect any loss or damage should be borne by the contractor. The storage space at the appellants' factory proving insufficient, they recommended a warehouse down town, and on August 3, 1920, wrote the following letter relative thereto:

"We have and will keep the material in storage fully insured against fire loss, and in the event of fire loss we hereby agree to reimburse you to the full extent of your interest therein.

"Also we agree to deliver all of this material to the building site upon your order.

"We wish to state, too, that we will bear the expense of this accommodation ourselves, as it is our desire and Mr. Webber's wish that we expedite the manufacture of this material, and he acquiesced in this plan of procedure." (Tr. p. 690.)

Later, on December 27, 1920, they wrote another

letter inquiring if the building company could take delivery of part of the window frames out of storage. In that letter they said, after referring to the rental which they were paying:

> "We do not mind retaining one floor for storage, and *while we realize it is a matter of merely our own concern to maintain warehouse space*, still we know you will appreciate the fact that delivery of the frames to the building has been greatly delayed through no fault of ours." (See Exhibit No. 167, Tr. p. 774.) (Italics ours).

Moreover at all times up to the 6th or 8th of January, 1921, the Building Company refused to take delivery. (See Tr. pp. 697, 707, 711, and Exhibit 167, Tr. p. 775.) Appellants attempt to meet this situation as follows:

> "We were through with the material when it was manufactured. The letter referred to by Mr. Oakley contains the following clause: 'Owing to the great quantity of this work and our limited storage facility, it will be necessary that we ask you to provide dry storage space and accept delivery as fast as manufactured.' " (Testimony George T. Davis, Tr. p. 713, Cf. Appellants' Brief pp. 32 and 45.)

The quotation thus made is from the carbon copy signed by Webber and forming a part of Exhibit 151. The language quoted is not to be found

in any of the formal written contracts which by their terms supercede all previous negotiations and agreements (see Article XX of these contracts, Tr. p. 199); it is not contained in the original proposal of these appellants, signed by R. T. Davis, Jr. (See Exhibit A, attached to the answer and cross complaint, Tr. p. 179, and Tr. p. 757); but strange to say is found only in what is offered as a carbon copy of Mr. Davis' letter. By reference to the original exhibit it will be seen that the copy bearing Webber's signature, while it is a carbon paper impression, is neither in form nor content a copy of R. T. Davis' letter. This carbon paper impression, signed by Webber, is stated by R. T. Davis, Jr., to be a copy of his proposal, and designated by his counsel, Mr. Flick, as a duplicate original. (See Tr. p. 666.) It is obviously neither the one nor the other. We submit that before credence is given to it, or any reliance placed on it the appellants should explain fully and clearly the discrepancies in form and matter between it and the original proposal on which their cross complaint is founded.

Each of the three formal contracts of these appellants contains an absolute waiver of any right of lien. (See Article XIV, quoted *supra*, Tr. p. 753.) The appellants seek to avoid the effect of that article of their contracts by claiming that they were induced by fraudulent representations to sign the contracts with that clause included. We

are not directly concerned with the sufficiency of the case made by them as to how they came to enter into the contracts they did. We do contend, however, that the appellants are estopped to make the claim that such waiver of lien is not binding by reason of their election to sue upon these contracts. This contention was not passed upon directly by the lower court, but since, if good, it will operate to deny any lien, and since the District Court did allow these appellants a small lien, the effect is that such contention was tacitly overruled. That the lower court erred in such action is in large part the basis of the joint appeal taken by E. E. Davis & Company, Far West Clay Company, and McClintic-Marshall Company. The pertinent facts and the law will be presented in the appellants' brief on that appeal, and no attempt will here be made to repeat them in their entirety, or exhaustively to set forth the law bearing thereon. The question has such a direct bearing upon the issues involved here, however, that we believe it can do no harm briefly to indicate what appear to be the controlling facts, and later to submit in barest outline the authorities bearing thereon.

Counsel for these appellants stated during the trial:

"We are not relying on the contract."

With all due deference we submit that that statement is belied by every other move of counsel,

and his clients, in the case, and was a policy statement not intended to bind the appellants, and therefore not entitled to any weight in the consideration of the present appeal. The original cross complaint of these appellants counted on these contracts, and sought to recover the profits which it was claimed would have been earned had the contracts been performed. (See paragraphs XII, XIII and XVI, and paragraph II of the prayer, Tr. pp. 171 to 176). These allegations were reiterated in substance in the amended answer and supplemental cross complaint. (See paragraphs XII, XIII and XVI thereof, Tr. pp. 218, 219, 221 and 222.) These appellants filed three different claims of lien. In each various items of anticipated profit are included. The one last filed (Exhibit 174, Tr. p. 785) is the one they now rely on. As to it, R. T. Davis, Jr., testified:

> "The last lien filed covers the amounts claimed in the first liens." (Tr. p. 693.)

The concluding paragraph of said lien is as follows:

> "That in said balance now designated as and for material, said balance contains a profit amount of $6,000 on the labor or erection contract, and also contains a profit amount of $1,000 upon the main millwork contract." (Tr. p. 786.)

As to said lien, it is alleged in paragraph XVI

of the amended answer:

> "That said lien comprises a total by way of amendment inclusive of the charge herein just recited of all the labor, material and profit claimed by these cross complainants under their various contracts." (Tr. p. 222.)

R. T. Davis, Jr., also testified as follows:

> "On the last sheet of Exhibit No. 154, Exhibits 'A' to 'G' inclusive, the total claim is $68,748.33, then we gave a credit of $6,240.50, and these items were made up about the time we filed the lien, and the balance due we claim was $62,500, and to this we have added profit we were entitled to on the balance of the labor contract, or $6,000, and profit that we were entitled to on the balance of the main contract and bank contract, $1,000, making a total balance of $69,507.83, and this includes the item of profit we would have made if the contract had been carried out." (Tr. p. 691; Cf. Tr. p. 773.)

At all times before the lower court, appellants contended that they were entitled to recover these profits, and in their briefs filed with the lower court they set out certain tabulations based, first, upon the contract price, second, upon reasonable value. In the first resume they include an item of $649.50, designated as anticipated profits upon the material contract, and an item of $6,000

designated as anticipated profits upon the labor contract. In the tabulation based on reasonable values, they include an item of $1,000 designated as "profit on uncompleted portion (of material contract) asked", and an item of $6,000, designated as "labor profit, erection contract."

In commenting up these statements, they say:

> "We therefore respectfully submit to Your Honor that a total profit $12,843.10 would not be out of the way, but in truth they are only asking $11,300."

Again in the course of the same brief they say:

> "The exhibits clearly portray the prices which, as the evidence shows, are practically the contract price. The exhibits also show the anticipated profits, so that there is nothing now to be added, if Your Honor please, to the pleadings or to the exhibits mathematically portraying this lienor's claim, nor in fact is anything lacking in proof."

and again:

> "If Mr. Metzger says that we are suing on contract and cannot do this, we can answer him that the reasonable price and reasonable profits are stated. If he says that we are not in a position to sue for reasonable value because we have used the term 'contract' in the evidence,

and have asked for profits, we can say to him that Your Honor has full power to reform the instrument under the pleadings and the facts so that we may without fear of technical difficulty sue upon the contract."

(For the right thus to refer to these briefs see the stipulation appearing in the transcript at p. 434.)

And as a last point in this connection, the intent to seek reformation of these contracts was expressly denied. (Tr. p. 694.) The disguise of words is too thin to prevent it clearly appearing that throughout this case appellants have sought to benefit by these contracts and to sue upon them to the end that they might have and recover their anticipated profits, but at the same time have sought to avoid the onus of them, to-wit, the express waiver of lien, by rescinding Article XIV alone, which is inseparable and indivisible from the remainder of the contract.

POINTS AND AUTHORITIES

As to Waiver of Lien

1. *The right to claim a lien was expressly waived.* (See Article XIV of all contracts; Tr. p. 753.)

2. *Such waiver is valid.*

Holm vs. C. M. & P. S. Ry. Co., 59 Wash. 293; 109 Pac. 799;

Gray vs. Hickey, 94 Wash. 370, at p. 374; 162 Pac. 564;

Pacific Lbr. & Tbr. Co. vs. Dailey, 60 Wash. 566, at p. 569; 111 Pac. 869;

Seattle Lbr. Co. vs. Cutler, 63 Wash. 662, at p. 665; 116 Pac. 1;

Davis vs. LaCrosse Hospital Assn., 99 N. W. 351; 1 Ann. Cas. 950 & note;

Baldwin Locomotive Works vs. Hines Lbr. Co., 125 N. E. 400, 13 A. L. R. 1059 at pp. 1061 to 1062;

Kelly vs. Johnson, 95 N. E. 1068, 36 L. R. A. N. S. 573;

27 Cyc., p. 261, *et seq.;*

18 R. C. L., Mechanics Lien, sec. 104.

3. *The waiver was supported by adequate consideration.*

27 Cyc., 263, *et seq.;*

18 R. C. L. Mechanics Liens, sec. 104, *et seq.;*

Grey vs. Jones, 81 Pac. 813, at p. 814, (Opinion by Judge Bean);

Hughes vs. Lansing, 55 Pac. 95, (Opinion by Judge Wolverton);

Annotation in 13 A. L. R. at p. 1065.

4. *The waiver cannot be avoided by rescission of Article XIV alone.*

(a) The contracts are entire and each is expressed to be "not severable or divisible". (See Article I of Contracts, Tr. p. 747, Appellant's Brief

p. 86, *et seq.*)

(b) There can be no partial rescission.

13 C. J. Contracts, sec. 682, and cases cited.
Girouard vs. Jaspar, 106 N. E. 849 (Mass);
Bernard vs. Fisher, 177 Pac. 762 (Idaho);
Cole vs. Smith, 58 Pac. 1086 (Colo.);
Federal Life Ins. Co. vs. Maxam, 117 N. E. 801 (Indiana);
Collinson vs. Ream, 144 N. W. 1050;
Cheney vs. Bierkamp, 145 Pac. 691, at 692 (Colo.);
Walker vs. McMillan, 160 Pac. 1062;
J. L. Owens Co. vs. Doughty, 110 N. W. 78 (N. D.);
Guild vs. Moore, 155 N. W. 44, at p. 49 (N. D.);
Seattle National Bank vs. Powles, 33 Wash. 21, at pp. 27 and 28; 73 Pac. 887;
Stuart vs. Hayden, 72 Fed. 402, at p. 411, Affirmed in 169 U. S. 1; 42 Law. Ed. 639.

5. *The waiver cannot to avoided by reformation of the contract.*

(a) There is no proper pleading to sustain reformation.

Story Equity Juris, 14th Ed. Vol. 2, sections 978 and 980;
34 Cyc. pp. 971 to 977;

Buchanan vs. Harrington, 53 S. E. 478.

(b) That appellants were seeking reformation was expressly disclaimed during the trial. (See Tr. p. 694.)

(c) There is no proof to sustain a claim of reformation.

34 Cyc., at pp. 921 and 974;

Story's Equity Juris. 14th Ed. Vol. 2, Sec. 978;

Williston Contracts, Vol. 3, Sec. 1525 p. 2714;

Hearne vs. Mutual Marine Ins. Co., 20 Wall. 488; 22 Law. Ed. 395, at pp. 396-7;

Simmons Creek Coal Co. vs. Doran, 142 U. S. 417, 35 Law. Ed. 1063;

Grieb vs. Equitable Life Assurance Soc., 189 Fed. 498, at p. 501; affirmed 194 Fed. 1021;

Long vs. Abstract Co., 158 S. W. 305 (Mo.);

Tedford Auto Co. vs. Thomas, 158 S. W. 500 (Ark);

Capps vs. Edwards, 60 S. E. 455 (Ga.);

Hesson vs. Hesson, 89 Atl. 107 (Md.);

American Fruit Co. vs. Barrett, 128 N. W. 1009 (Minn.);

Dennis vs. Northern Pacific Ry. Co., 20 Wash. 320; at p. 323; 55 Pac. 210.

As to Right of Lien

1. *The Lien sought to be foreclosed is of local statutory origin.*

> "Every person performing labor upon or furnishing material to be used in the construction, alteration, or repair of any * * * building * * * has a lien upon the same for the labor performed or material furnished by each respectively, whether performed or furnished at the instance of the owner of the property, subject to the lien, or his agent; and every contractor, sub-contractor, architect, builder or person having charge of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter: * * *"

Remingtons 1915 Codes and Stat. of Wash., Sec. 1129;

Remingtons 1922 Comp. Stat. of Wash., Sec. 1129.

2. *The lien statute being in derogation of the common law must be strictly construed in determining the parties benefitted thereby.*

Tsutakawa vs. Kumamoto, 53 Wash. 231, at p. 236; 101 Pac. 869.

3. *A Federal Court in enforcing a statutory remedy of the state in which it sits is bound by the*

construction of that statute placed thereon by the highest court of the state.

Detroit vs. Osborne, 135 U. S. 492, 34 L. Ed. 260;

Northern Pacific Ry Co. vs. Meese, 239 U. S. 614, 60 Law. Ed. 467 at 468; reversing 211 Fed. 254;

Loewe vs. Savings Bank, 236 Fed. 444, affirmed 61 Law. Ed. 360;

In re Seward Dredging Co., 242 Fed. 225; Certiorari denied, 245 U. S. 651; 62 Law. Ed. 531;

Columbia Digger Co. vs. Sparks, 227 Fed. 780 (C. C. A. 9th Cir.);

American Surety Co. vs. Bellingham Nat. Bk., 254 Fed. 54 (C. C. A. 9th Cir.);

25 C. J. Federal Courts, p. 832, and cases there cited.

Bank of Follansbee vs. Follansbee Lbr. Co., 248 Fed. 645.

4. *The Supreme Court of Washington has construed this and cognate statutes to require actual delivery upon the liened premises as a prerequisite to a lien.*

Huttig Bros. vs. Denny Hotel Co., 6 Wash. 122; 32 Pac. 1073;

Fuller vs. Ryan, 44 Wash. 385; 87 Pac. 485;

Gate City Lbr. Co. vs. Montesano, 60 Wash. 586; 111 Pac. 799;

Holly-Mason Hardware Co. vs. National Surety Co., 107 Wash. 74; 180 Pac. 901.

See also:

Jacobs Co. vs. Brandt, 44 Wash. 68; 87 Pac. 43;

Crane Co. vs. Farandis, 46 Wash. 436; 90 Pac. 1134;

Tsutakawa vs. Kumamoto, 53 Wash. 231; 101 Pac. 869;

State Bank vs. Ruthe, 90 Wash. 636; 156 Pac. 540;

Ashford vs. Iowa M. Lbr. Co., 81 Neb. 561; 116 N. W. 272;

Foster vs. Dohle, 17 Neb. 631; 24 N. W. 208;

Baker Lbr. Co. vs. Marathon Paper Co., 130 N. W. 866; 36 L. R. A. N. S. 875.

5. *There can be no lien so long as title to the materials for which a lien is claimed remains in the claimant.*

(a) The theory of such liens is that the labor or material has gone into and enhanced the value of the premises or structure against which the lien is claimed.

Lipscomb vs. Exchange Nat'l Bank, 80 Wash. 296; 141 Pac. 686;

Foster Lbr. Co. vs. Sigma Chi Chap. House, 97 N. E. 801, at p. 803 (Ind.).

(b) The term "furnish" in the lien statute imports a sale and delivery.

Burns vs. Sewell, 51 N. W. 224;

Baker Lbr. Co. vs. Marathon Paper Co., 130

N. W. 866; 36 L. R. A. N. S. 875 (Wis.);
Barnett vs. Stevens, 43 N. W. 661;
Foster Lbr. Co. vs. Sigma Chi Chap. House, 97 N. E. 801;
Richmond Const. Co. vs. Richmond R. Co., 68 Fed. 105 and 118; 15 C. C. A. 289;
Williams vs. Chapman, 65 Am. Dec. 669;
Loonie vs. Hogan, 61 Am. Dec. 694.

6. *Title remained in appellants as to all materials, except possibly the small amount actually delivered.*

(a) Under appellant's contracts it was the intent that title should not pass until actual incorporation of the materials in the building. (See Articles II, V, XI, and XVII of the contracts, Tr. pp. 747 to 754.)

(b) Title never passes in absence of clear expression of such intent so long as anything remains to be done upon the article sold by the vendor.

35 Cyc., Sales, p. 229;
24 R. C. L., Sales, Sec. 293, p. 31;
Clarkson vs. Stevens, 106 U. S. 505; 27 L. Ed. 139;
River Spinning Co. vs. Atlantic Mills, 155 Fed. 466, at p. 471;
Annotation in 50 L. R. A. N. S., at p. 122.

(c) The contracts being entire, title could not have passed as to the materials completely manu-

factured without delivery while other materials forming an integral part of the same contract remained wholly or partially incomplete.

24 R. C. L., Sales, Sec. 298, at p. 35;
Annotation in 50 L. R. A. N. S., at p. 128;
North Pac. Lbr. Co. vs. Kerron, 5 Wash. 214; 31 Pac. 595;
Meeker vs. Johnson, 3 Wash. 247, 28 Pac. 542.

(d) Delivery to appellant's warehouse was not such a delivery as effected a change in title.

35 Cyc., Sales, p. 304;
Annotation in 50 L. R. A. N. S. at p. 140;
Pittsburgh C. & St. L. R. Co. vs. Hicks, 19 Am. Repts. 713.

7. *Profits are not lienable.*

Gray vs. Hickey, 97 Wash. 278; 166 Pac. 625.

8. *The commingling in a claim of lien of lienable and non-lienable items destroys the lien.*

Gilbert Hunt Co. vs. Parry, 59 Wash. 646 110 Pac. 541;
Robinson vs. Brooks, 31 Wash. 60; 71 Pac. 721;
Whittier vs. Stetson Post Mill Co., 6 Wash. 190; 33 Pac. 393;
Knibb vs. Martenson, 89 W. 595; 154 Pac.

1109;

Sheldon vs. Chicago Bldg. & Surety Co., 181 N. W. 282.

As to the Rank of Appellants' Lien, If Any

1. *Under the Washington statutes appellants were contractors.*

Young Men's Christian Assn. vs. Gibson, 58 Wash. 307; 105 Pac. 766;

Architectural Decorating Co. vs. Nichlason, 66 Wash. 198; 119 Pac. 177;

Chavelle vs. Island Gun Club, 77 Wash. 304, at p. 310; 137 Pac. 511.

(b) A contractor's lien is subordinate to those of laborers and materialmen.

"In every case it which different liens are claimed against the same property the court in the judgment must declare the rank of such lien or class of liens which shall be in the following order:—1, all persons performing labor; 2, all persons furnishing material; 3, sub-contractors; 4, the original contractor; and the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; * * *"

Remington's 1915 Codes & Stat. of Wash., Sec. 1141;

Remington's 1922 Compiled Stats. of Wash., Sec. 1141.

As to the Amount Lienable, If Any

From the contract prices must be deducted:

(a) Anticipated profits.

Gray vs. Hickey, 97 Wash. 278; 166 Pac. 625.

(b) The value of materials for which no claim is made. (See Items marked "N. C.", Exhibit 154, Tr. p. 766.)

(c) The value of materials not completely manufactured.

ARGUMENT

Either the Tacoma Millwork Supply Company had a series of contracts calling for the manufacture of specially designed material and its installation in the building, or those contracts were annulled by reason of the fraud which induced them, and there was no contractual relationship between them and the Building Company whatsoever. Upon the first hypothesis there is no right of lien because that had been expressly waived. Upon the second the appellants and Building Company were entire strangers to each other, except to the limited extent that the appellants actually furnished, i. e., delivered to the Building Company, for use in the building certain materials which they had worked up into the form of window frames and the like.

These propositions are mutally exclusive one of the other, a point apparently not observed by the trial judge, since his findings as set forth in his memorandum decision (Tr. p. 436, at pp. 463 to 467) apparently proceed upon the second hypothesis, while the decree entered, since it awards judgment in favor of these appellants upon their contracts and for the damages in the way of lost profits (Tr. pp. 512 to 514), goes upon the other. We believe that the appellants have chosen to rest their claims upon the first hypothesis, and that this court in reviewing the case will so find.

The Lien Waiver

It was not disputed in the court below that a provision for the waiver of the right to claim a lien is valid and enforcible when expressed in language "clear, certain and unequivocal", and supported by an adequate consideration. Neither was it claimed that the language of Article XIV of appellants' contract was wanting in clarity, certainty or exactness, nor that it was without consideration. No such contention is made here. The effect of said Article XIV was sought to be avoided solely upon the ground of fraud. On this point the trial court found that these appellants were induced to enter into this contract through fraudulent misrepresentation. (See Memorandum Decision, Tr. p. 441.) The correctness of such finding is the subject of attack by the receiver of the

Building Company. (See Receiver's Assignment of Error IX, Tr. p. 550.) For the purpose of our discussion we shall assume, without admitting and without intending in any way to prejudice the Receiver's appeal, that the alleged inducing fraud was sufficiently proven to entitle appellants to rescission of the entire contract. Our position throughout has been and is that the alleged fraud, if it vitiates the contracts at all, vitiates them in their entirety; that rescission can not be partial, but must be of the whole; but that appellants having nevertheless and notwithstanding their efforts to establish the fraud, waived it and elected to seek recovery upon and under their contract.

The rule denying partial rescission can hardly be gainsaid. It is in effect admitted, since counsel for these appellants said in the brief submitted to the trial court, "We are familiar with the principle that one cannot ordinarily rescind any part and still get the benefit of the contract".

> "Partial rescission. A rescission must be in toto. A party cannot affirm a contract in part and repudiate it in part. He cannot accept the benefits on the one hand while he shirks its disadvantages on the other, unless the two parts of the contract are so severable from each other as to form two independent contracts."
>
> 13 C. J. Contracts, Sec. 682, p. 623.

"It is plain that if a party to a contract seeks to avoid it by reason of the fraud or failure of the other party to comply with its terms, he cannot rescind it as to some of its provisions and rely upon it as to others. In order that this lien may be maintained it must appear that the petitioner has substantially performed his part of the contract, and *it must further appear that there is nothing in the contract itself which will prevent the establishment of the lien.* (Italics ours.) * * * If he (the petitioner) was induced to make the contract by reason of the fraudulent representations of Jaspar, on discovery thereof he could have rescinded it as a whole, and have brought an action at law for its breach, or he might have brought an action declaring upon a *quantum meruit* for the value of the labor and material furnished, or he could have availed himself of the remedy provided for the enforcement of a mechanics lien to recover for the value of the labor and material furnished."

Girouard vs. Jaspar, 106 N. E. 849. (Mass.)

"Appellants (the lien claimants) do not seek to rescind the contract in toto and to recover the reasonable value of their services and materials. They do not allege that they were induced by fraud, misrepresentation or mistake to accept the water rights and mortgage, in ignorance of their real character, nor

do they, having failed to return the property delivered to them or to allege any reason for their failure to do so, sue for the damage resulting from the difference between that which they received and that which they contend they were entitled to. Having retained this property they must be held to have retained it in full payment of the amount due under the contract, and cannot be heard to say they accepted it in partial payment or on account. *They attempted in this action to avail themselves of the portion of the contract which fixes the amount of their compensation, and they cannot repudiate but must be held to be bound by the provisions thereof, which gave respondents an option to pay with water rights and a mortgage instead of money.*" (Italics ours.)

Bernard vs. Fisher, 177 Pac. 762 (Idaho).

"One who is induced to make a sale or trade by the deceit of his vendee has a choice of two remedies upon his discovery of the fraud. He may affirm the contract and sue for his damages; or he may rescind it and sue for the property he has sold. The former remedy counts upon and affirms the validity of the transaction; the latter repudiates the transaction and counts upon its invalidity. The two remedies are utterly inconsistent, and the choice of one rejects the other because a sale can not be valid and void at the same time.

Stuart vs. Hayden, 72 Fed. 402, at p. 411. Affirmed in 169 U. S. 1, 42 Law. Ed. 639.

Since then the law will not permit an affirmance in part, to-wit, of that which is beneficial, and a rejection of the remainder, to-wit, that which is detrimental, what will it be said the appellants have done here? That they have attempted both to affirm and reject seems undeniable. They have sued on their contracts and for damages in the shape of lost profits, yet throughout their pleadings and their testimony they speak of and claim for reasonable values as if suing upon a *quantum meruit*. The two remedies are inconsistent.

> "There can be no doubt that, where a contract is breached, the party injured may pursue one of two remedies: first, he may sue upon his contract and recover his loss of profit; or, second, he may waive the contract and sue upon a *quantum meruit;* but he cannot pursue both remedies, for they bear a different measure of damages. *Gabrielson vs. Hague Box & Lbr. Co.*, 55 Wash. 342, 104 Pac. 635, 133 Am. St. 1032. This is no doubt, the general rule."

Gray vs. Hickey, 97 Wash. 278, at 279; 166 Pac. 625.

The acts of affirmance are: First, the claim of lien for materials manufactured under and in accordance with a contract, which materials generally speaking were only partially completed, and

with comparatively insignificant exceptions, wholly undelivered; second, the claim of lien for profits, which would have been earned had the contracts been fully performed. A claim to profits in a case of this kind can only rest upon the breach of some valid, subsisting contractual right, e. g., the prevention of performance of a subsisting contract. These acts are not single or isolated. They commenced with the filing of the notices of lien, they are carried into the answer and cross complaint, and into the amended answer, they permeate the testimony offered, they appear in the trial briefs, they form a ground of exceptions to the court's opinion (Tr. pp. 472 to 477) as well as to the decree entered, (Tr. pp. 538 to 542) they form the basis of the Assignments of Error, and fill the brief filed herein.

Their acts of rejection consist of the attempted proof of fraud and the statement of counsel that they are not relying upon the contract, which statement is very largely qualified by the express disclaimer of any attempt to seek reformation. (Tr. p. 694.)

Upon this record they must be held to have in fact elected to sue on their contracts. In that event all right to claim a lien is waived. But let us take them at their word, namely, that they are not relying upon the contract or contracts. Then one of two things must have happened. Either these contracts have been rescinded, or they are

to be reformed. And, first, of rescission.

The Building Company may or may not be liable for damages for the fraud perpetrated. With that we, in this brief, are not concerned, since such damages clearly do not afford any ground for a lien. But the contracts being rescinded and therefore treated as non-existent, the Building Company in not taking delivery of materials violated no rights of the appellants and caused them no damage for which the building premises can in any way be holden under lien foreclosure proceedings. The appellants and Building Company have on this theory become strangers to each other. There is no contract to manufacture materials according to special plans, or designs, but only a few isolated sales of window frames or scaffold bucks by the appellants to the Building Company, and the right to a lien is thus limited to those sales and to the value of the materials thereby actually furnished, an intolerable position for the appellants.

Driven then from an action on the contract, with its inexorable waiver, and from the complete fall and wiping out of these contracts through rescission thereof, appellants must perforce take refuge in reformation or in a claim of *quantum meruit.*

As to reformation, we have no hesitancy in asserting that there is no ground either in the pleadings or in the proof for such relief. The pleadings count on the contracts and set them out.

They allege that these contracts were induced by fraud, but do not claim that the agreements the appellants intended to make were other or different from those actually entered into, and naturally they do not set out the agreements intended to be made.

"In order to make out a good cause of action (for reformation of an instrument) the bill of complaint or petition should show every element necessary to entitle the complainant to equitable relief, with especial reference to the following: (1) The grounds of reformation; (2) the agreement actually made; and (3) the agreement which the parties intended to make. * * *

"Reformation at the instance of a defendant should be made by alleging the mistake and asking affirmative relief by a cross bill, cross petition, or counter claim, and in such pleading the same rules as to the sufficiency of allegations apply as in the case of a bill or complaint. Relief cannot be had, however, without setting up facts upon which the equitable jurisdiction depends."

34 Cyc, Reformation of Instruments, pp. 971 and 977.

"It must be alleged and proven that the instrument sought to be corrected failed to express the real agreement or transaction be-

cause of mistake common to both parties, or because of mistake of one party, and fraud or inequitable conduct of the other."

Story's Equity Jurisprudence, 14th Ed. vol. 2, Sec. 980.

"If a party demands equitable relief he must specially allege the facts upon which he seeks the aid of the court in the exercise of its equitable jurisdiction."

Buchanan vs. Harrington, 53 S. E. 478, at 479 (N. C.).

There is no claim in the pleadings that the writing fails to embody the real agreement, and when it comes to the matter of proof appellants are met, first, by the fact that they expressly disclaimed any attempt at reformation (Tr. p. 694), and, second, by the fact that it is perfectly clear from the evidence that when the formal written contracts were submitted by the Building Company for execution these contracts were examined in detail, every provision was read and their contents fully known. Thereafter the contracts were executed in the shape in which they now appear in evidence as Exhibits 151, 152 and 153. Any claim that they were signed in ignorance of their true terms or by mistake is utterly vain. (See Tr. pp. 707, 714, 693, 695, 696, 698 and 699.) The fraud, if fraud there was, was not in the execution of the contract with the Millwork Supply Company, but

in the consideration for it, and hence is not such fraud as will give rise to a right of reformation.

"Fraud to be the basis of reformation of contract must be fraud in the execution thereof.

34 Cyc, Reformation of Instruments, 921.

"The grounds for reformation are mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, and to constitute a good cause of action the grounds upon which it is based must be alleged."

34 Cyc, Reformation of Instruments, 974.

"The equitable doctrine of reformation of written instruments is usually applied where there has been a mutual mistake on the part of both parties to the contract, or else where there has been a mistake on the part of one of the parties and fraud in the other."

Story's Equity Juris., 14th Ed. vol. 2, sec. 978.

"Where a writing owing to the fraud of one of the parties and mistake of the other, fails to express the agreement at which they arrived, reformation will be allowed."

Williston Contracts, vol. 3, p. 2714.

"The party alleging the mistake must show exactly in what it consists and the correction

that should have been made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. *Beaumont vs. Bramley*, 1 Turn. & Rus., 41; *Breadalbane vs. Chandos*, 2 Myl. & C., 711; *Fowler vs. Fowler*, 4 De Gex & J., 255; *Sells vs. Sells*, 1 Drew. & Sm., 42; *Lloyd vs. Cocker*, 19 Beav. 144. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. *Rooke vs. Kensington*, 2 K. & J., 753; *Eaton vs. Bennett*, 34 Beav., 196. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. *Mortimer vs. Shortall*, 2 Dr. & War., 372; *Sells vs. Sells, supra.*"

Hearne vs. N. E. Mutual Marine Ins. Co., 87 U. S. 490 22 L. Ed. 397.

"The jurisdiction of equity to reform written instruments, where there is a mutual mistake or mistake on one side, and fraud or inequitable conduct on the other, is undoubted; but to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court. *Fishback vs. Ball*, 34 W. Va. 644; *Shenandoah Valley R. Co. vs. Dunlop*, 86 Va. 346."

Simmons Creek Coal Co. vs. Doran, 142 U. S. 417, at 435; 35 L. Ed. 1063, at 1071.

"Reformation of a contract will not be granted by a court of equity unless there has been a mistake which is mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescission, but not for reforming a contract. Where there has been a mistake of one party, accompanied by a fraud or inequitable conduct of the remaining parties, in such cases the instrument may be made to conform to the agreement or transaction entered into according to the intention of the parties."

Grieb vs. Equit. Life Assurance Soc., 189 Fed. 498 at 501.

In *Long vs. Abstract Co.*, 158 S. W. 305, the court declared the following doctrine axiomatic, namely:

"That a court of equity will construe and reform a contract so as to express the real intention of the parties thereto, or annul and cancel the same, where it is illegal and void for any reason; yet it will not make a contract for the parties thereto or reform the same except for the purpose of expressing the real intention of the parties."

And in the further course of the opinion said:

"In the first place fraud is not a ground

for reforming a deed of trust, or any other contract for that matter, that I ever heard of. Fraud is well known ground for the cancellation of a contract, but not for its reformation."

(Opinion at p. 308.)

Reformation is therefore unavailing to these appellants.

As to a claim on *quantum meruit* we should again say that it is of no concern of ours, except to the extent that it shall form the basis of a right to a lien.

Right of Lien

The statute under which this claim is prosecuted gives a lien for all labor performed upon and for all material furnished, to be used in the construction of any building. The chief question here, therefore, is what constitutes a furnishing of material to be used in the construction within the language of the statute?

While this statute is to be construed liberally for the benefit and protection of those clearly within its provisions, yet, being in derogation of the common law and creating a lien wholly unknown to the common law, it must be strictly construed in determining those who are benefitted thereby.

"Liens of this character are in derogation of the common law. Depending solely on the

statutes, courts have persistently refused to extend their operation for the benefit of those who furnish supplies, means or money to carry on a work. unless they come clearly within the terms of the statute."

Tsutakawa vs. Kumamto, 53 Wash. 231, at p. 236; 101 Pac. 869.

Certain principles relating to this class of liens are thoroughly established by binding decisions of the Supreme Court of this state.

First. *To furnish materials within the contemplation of the statute there must have been a delivery thereof.* The preparation of materials specially designed for a building does not constitute commencing to furnish materials.

"Appellant contends that it commenced to furnish materials from the time that it began to prepare the same for shipment in the state of Iowa, and in consequence of its having commenced the preparation thereof before the execution of the mortgage its lien is superior to the mortgage lien, but the lien can hardly date from the time appellant commenced the preparation of the materials in another state. It was to furnish the materials delivered at the building in the city of Seattle, and its claim cannot be held to have attached before the delivery thereof. *Williams vs. Chapman*, 17 Ill. 423."

Huttig Bros. Mfg. Co. vs. Denny Hotel Co,.
6 Wash. 122, at p. 130; 32 Pac. 1073.

Appellants' contract required that the materials be delivered and put in place in the building.

Stated in another way, the proposition enunciated in the foregoing case and cases following it, hereinabove previously cited, amounts to this: That materials are not furnished within the meaning of the lien statute at least until there has been such a delivery of them as to pass title thereto. In the present case the appellants have never parted with possession or title to any materials, with the possible exception of the few window frames delivered to the building. The remainder were either at the factory in various stages of completion, or were stored at the warehouse which appellants secured and for which they paid the rental, and such materials were in said warehouse, insured by the appellants as their property. Without repetition of the authorities cited, it seems to admit of no doubt that title had not passed from the appellants. The delivery was not made as by the contract required, it was not a delivery to any third party, and the appellants, while as a matter of accommodation they permitted the Building Company's painters to have access to such of the work as was completed, nevertheless retained both possession and control of the material, either to complete its manufacture or to prepare it for installation in the building, and insured it as their own. Furthermore, after

the suspension of building operations they recognized that title had not passed, and so made the abortive effort nearly two months after all building operations had ceased to surrender the keys of the warehouse to the receiver of the Building Company. (Tr. p. 708, Exhs. 168-169.) And during the trial they argued:

> "But Your Honor has missed the real point in the situation, that the material has been tendered, and that a simple order will declare its relationship to the building, and hence the building is enhanced rateably." (Cf. exceptions to Decree, paragraph 14, Tr. p. 47, also appellant's Brief p. 61.)

Second. *Even though there should have been a delivery sufficient to pass title, yet such delivery does not constitute a furnishing within the lien statute unless the materials either are actually used in the building or delivered on the ground for use therein.*

In *Gate City Lumber Co. vs. Montesano*, the court was considering the right of a materialman to recover against the city of Montesano for materials furnished a contractor on public work, the city having failed to require the contractor to enter into the bond contemplated by the statute in connection with such contracts. The claimant in response to inquiry from the contractor had stated that he could furnish the lumber for $9 a thousand f. o. b. Gate, Washington. Gate is some thirty

or forty miles distant from Montesano. The lumber was ordered and delivered on the cars at Gate by the claimant and shipped to Montesano. What became of it thereafter was uncertain. Some of it was actually used. Some more was perhaps delivered on the ground, and afterwards diverted, and a further part was diverted direct from the cars at Montesano to other work. Under the circumstances, however, there was no question but what title to the lumber had passed from the claimant to the contractor when the same was loaded on the cars at Gate. His Honor, Judge Rudkin, then Chief Justice of the Washington Supreme Court, wrote the opinion, and said:

> "The question then arises, who is a materialman and what is a just debt incurred in the performance of contract work within the meaning of the act of 1909? In the case of *Fuller Co. vs. Ryan*, 44 Wash. 385, 87 Pac. 485, we held that a materialman could not claim a lien for material which was neither used in the building nor delivered on the ground for use therein. See also *Foster vs. Dohle*, 17 Neb. 631, 24 N. W. 208; *Weir vs. Barnes*, 38 Neb. 875, 57 N. W. 750. We are not disposed to place a broader construction on the term *materialman* and *just debts incurred in the performance of contract work* under this statute."

Thereafter the opinion proceeds by quoting with

approval from *Foster vs. Dohle.* The opinion concludes as follows:

> "The judgment will therefore be reversed and a new trial awarded for the purpose of ascertaining the value of the material actually used in the performance of the contract or delivered at the works for use therein. The court will give judgment for such value when ascertained, but the respondent is entitled to recover nothing from the city beyond this."

All this is in conformity with the theory underlying such liens, namely, that the labor or material has gone into and enhanced the value of the premises or structure against which the lien is claimed.

> "The object of these statutes is to secure a lien to the laborer, and the materialman, for that which goes into the finished structure."
>
> *Tsutakawa vs. Kumamoto*, 53 Wash. 231, at 235; 101 Pac. 869;

quoted with approval in:

> *Gilbert Hunt. Co. vs. Parry*, 59 Wash. 646, at 649; 110 Pac. 531.

How then can there be a lien in the instant case when there not only has been no delivery, but on the contrary there has been retention of title? We submit without fear of contradiction that there

is no decision of the Supreme Court of Washington in a lien case upholding the right to a lien under such circumstances.

Appellants, however, rely upon *Western Hardware & Metal Co. vs. Maryland Casualty Co.*, 105 Wash. 54, 177 Pac. 703, 181 Pac. 700. This was not a lien case, but was an action to recover against a bond given by a contractor in connection with a contract made with Seattle School District No. 1 for furnishing the material and installing a heating and ventilating plant in a school house in Seattle. The statute governing in such cases provides that the bond shall be conditioned that the contractor shall "* * * pay all laborers, mechanics and sub-contractors and materialmen, and *all persons who shall supply such person or persons or sub-contractor with provisions and supplies for the carrying on of such work* * * *" (italics ours).

> Remington's 1915 Code, Sec. 1159;
> Remington's 1922 Compiled Stats., Sec 1159.

The court in that decision considered the analogy between mechanics and materialmens lien statutes and bonding statutes, such as the one under consideration, and said:

> "This analogy * * * would seem to be complete when both the lien and bonding statutes define the work and material, the payment for which is secured by the lien or the bond

in substance the same."

The court then proceeds to review certain of its previous decisions, both upon the lien statutes and upon the bonding statutes, and also certain cases from other jurisdictions, and after so doing approves the rule in *Huttig Bros. vs. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073, that while there could be no lien before the actual delivery of the materials to the premises, a lien would be allowed for the materials actually so delivered, although they were not incorporated into the building, saying:

> "While we concede that the authorities are not harmonious upon the question of the necessity of the material actually going into and becoming a part of the structure, in order to support a lien right, which is the particular question we are now considering, we think the decided weight of authority is in harmony with the early holding of this court in the Denny Hotel case and the cases from other courts above quoted from." (Opinion at p. 66.)

It will be noted, therefore, that up to this point the decision goes no further than reaffirming the rule that actual incorporation into the structure is unnecessary, and in so doing cites the case of *Crane Co. vs. U. S. Fid. & Guar. Co.*, 74 Wash. 91, 132 Pac. 872, which distinctly holds that the bonding statute covers claims not lienable under Rem. 1915

Code, Sec. 1129. What is of equal significance, however, the court does not mention or apparently consider the cases of *Fuller vs. Ryan*, 44 Wash. 385, 87 Pac 485, and *Gate City Lumber Company vs. Montesano*, 60 Wash. 586, 111 Pac. 799, in the first of which it was said:

> "If the materials were not used in the building nor taken to the premises, we do not think it could be said that they were purchased to be used in such building within the meaning of the statute. The reason for allowing a lien to secure the purchase price of building material would seem to be absent where such material was neither used in the building nor taken to the premises for that purpose; and it would be difficult to see why the vendor of such material would have any better right to a lien than would the seller of any other species of personal property." (Opinion at p. 386.)

The opinion in the Western Hardware Company case then reverts to the peculiar language of the bonding statute, and after calling attention to the fact that the condition of said bond "is that the contractor shall pay sub-contractors and all persons who shall supply sub-contractors with provisions and supplies *for the carrying on of such work*", proceeds as follows:

> "The words 'provisions and supplies', so used we think include materials such as the

sheet metal furnished by respondent, and the words 'for the carrying on of such work', refer to the furnishing to sub-contractors of such material for that purpose in good faith, though it may not be actually used in the construction of the building or plant by reason of some fault of the contractor or sub-contractor and without fault of the one so furnishing the material."

Therein is the crux of the decision. The opinion proceeds further, and in distinguishing the Gate City Lumber case says: that the delivery to the railroad company was there held, to be,

"not such delivery at or near the place where the lumber was to be used as to give the lumber company a right of action upon the bond. In that case there was no understanding and necessity for the lumber being delivered at a shop or place where the contractor or sub-contractor was specially preparing his material before being placed in the structure as in this case."

and in the conclusion Judge Parker says:

"The question of whether a delivery of material to a contractor or sub-contractor is such as to entitle the one so furnishing it to recover upon the bond, if the work be public, or to a lien if the work be private, *is not one which can be determined by a hard and fast rule applicable to all cases.* It seems to us that where material is delivered to a sub-contractor

in good faith for the carrying on of the work as in this case, at a convenient shop of the sub-contractor, where it is understood that the material is to be prepared for the structure, and the work of such preparation is there actually being done, such delivery is sufficient to entitle the materialman so furnishing and delivering the material *to recover upon the bond given for the security of the materialman.*"

(Opinion p. 68; italics ours.)

It will be noted with respect to this decision, first, that in the last analysis the claim is upheld upon the peculiar language of the statute referring to the furnishing of provisions and supplies for the carrying on of the work; second, that the claimant had made delivery of his material and parted with the title thereto; third, that it was understood between the contractor who gave the bond and the sub-contractor and the materialman that the material should be delivered at the shop of the sub-contractor to be prepared for use in the structure, and the contractor was notified that such delivery had been made. In the present case there is no materialman who has parted with title to his property, nor is there any estoppel to the prejudice of the other lien claimants. Upon the peculiar facts then before the court the decision as to the place of delivery, if it can be said to be a decision and not mere dictum, rests up the theory that the bonding company, a compensated surety, was re-

sponsible for the acts of the contractor, and the contractor, having permitted the work to be done at the sub-contractor's shop and delivery to be made there, was estopped to say that such delivery was not a delivery to the building being improved.

Such construction has been placed upon this decision by the Supreme Court of the state of Washington by its holding in the later case of *Holly-Mason Hardware Co. vs. National Surety Co.*, 107 Wash. 74, 180 Pac. 901. This decision, rendered five months after the decision in the Western Hardware Company case by the same department, construing the same statutes, makes no mention of the Western Hardware decision, but says:

> "It will be observed that the statute (Remington's 1915 Codes, sections 1159 to 1161-1) does not in terms make use in the building a necessary prerequisite to a right of recovery on the bond for materials furnished, nor does it make delivery on the grounds such a necessary prerequisite. This court has held, however, in construing a statute with similar provisions, of which the present statute is but amendatory, that one or the other of such conditions must be shown before a recovery can be had."

Judge Fullerton, writing the opinion, then proceeds to quote from the decision in the Gate City Lumber Company case and to repeat the quotation

there made from *Foster vs. Dohle*, 17 Neb. 621, 24 N. W. 208, which in part is as follows:

> "The contractor, however, unless expressly constituted such, is not the agent of the builder and cannot bind him by contracts for materials not put into the building or delivered at the same for use therein, and as there is nothing to show that any of the material not allowed by the court below was delivered at or used in the building the owner thereof is not liable for the same."

The principle of the Nebraska case is approved as being "eminently just", is held to constitute a bar to recovery except for such material as was actually delivered at the building, and the opinion then concludes with this language:

> "We have concluded therefore to direct a reversal and a remanding of the cause with instructions to ascertain what proportion of the materials sold the contractor were actually used in the construction of the building or were actually delivered on the ground for use therein."

This opinion, therefore, reiterates the rule that notwithstanding a sale and the passing of title, yet the further condition of actual use or actual delivery upon the ground is a further prerequisite to the establishment of a lien or claim against the bond. Neither of those prerequisites obtained in

the instant case.

Decisions from other jurisdictions are of little importance, since the construction of the Supreme Court of the State of Washington is binding upon this court, but it may not be out of place to observe that the holding of the Supreme Court of the State of Washington is in line with the holding of many of the other states of the Union.

See:

Ashford vs. Iowa & M. Lbr. Co., 81 Neb. 561, 116 N. W. 272;
Foster vs. Dohle, 17 Neb. 621, 24 N. W. 208;
Baker & S. Lbr. Co. vs. Marathon Paper Co., 130 N. W. 866, 36 L. R. A. N. S., 875 (Wis.);
Foster Lbr. Co. vs. Sigma Chi Chap. House, 49 Ind. App. 528, 97 N. E. 801;
Barnett vs. Stevens, 43 N. W. 661;

and compare:

Bank of Follansbee vs. Follansbee Lbr. Co., 248 Fed. 645;
Atlantic Terra Cotta Co. vs. Moore Const. Co., 80 S. E. 924 (W. Va.);
Voightman & Co. vs. Southern Ry. Co., 131 S. W. 982 (Texas);
Fetcher Crowell Co. vs. Chevalier, 36 L. R. A. N. S. 871, 81 Atl. 578 (Me.).

The cases cited by these appellants, which in-

clude all those cited on the same point by counsel for Washington Brick, Lime & Sewer Pipe Company, fall chiefly into two groups:

First, where there was an actual delivery to the liened premises of all the material for which a lien was claimed, but some part thereof was not actually used, due to there being a surplusage, a subsequent diversion by the principal contractor, a change in the plans, or other similar cause. In this group are: *Crane Co. vs. U. S. Fidelity & Guar. Co.*, 74 Wash. 91, 132 Pac. 872; *Nelson vs. Iowa Eastern R. Co.*, 51 Iowa 184, 1 N. W. 434; *Burns vs. Sewell*, 48 Minn. 425, 51 N. W. 224; *John Paul Lbr. Co. vs. Hormell*, 63 N. W. 718; *Minneapolis Sash & Door Co. vs. Hedden*, 154 N. W. 511; *North Land Pine Co. vs. Northern Insulating Co.*, 177 N. W. 635. With this group we have no quarrel. They do not fit the case presented by the lien claimants now appealing. However, we call further attention to the fact that the decisions in *John-Paul Lbr. Co. vs. Hormel*, and *Minneapolis Sash & Door Co. vs. Hedden*, are upon their special fact contrary to the rule in the state of Washington as laid down in *Knudson-Jacobs Co. vs. Brandt*, 44 Wash. 68, 87 Pac. 43, and *Little Bros. Mill Co. vs. Baker*, 57 Wash. 311, 106 Pac. 910. The definition of the term "furnish" made by the Supreme Court of Minnesota in *Burns vs. Sewell* should be noted, namely:

"In the ordinary understanding of the terms

'furnished for the erection of', etc., the furnishing the material is complete when it is sold and delivered for the purpose of the erection;" (51 N. W. at p. 225).

Second, where there was delivery of material to a common carrier in accordance with the contract of the material man, though at a point distant from the liened premises, the holdings being that such delivery conforming to the contract passed title from the material man and constituted a furnishing sufficient to support a lien. In this group are *McEwen vs. Montana Pulp & Paper Co.*, 90 Pac. 359, *Clarke vs. Lindsey & Co.*, 47 Pac. 102, *Watson Coal Mining Co. vs. James*, 72 Iowa 184, 33 N. W. 622; *Congdon vs. Kendall*, 53 Neb. 282, 73 N. W. 659; *Manufacturing Co. vs. Hunter*, 15 Neb. 32, 16 N. W. 759; *King vs. Cleveland Ship Building Co.*, 50 Ohio State 320, 34 N. E. 436. With this group we disagree. They are not controlling here, since they are in direct conflict with the clear and specific rulings of the Supreme Court of Washington in *Huttig Bros. vs. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073, *Gate City Lbr. Co. vs. Montesano*, 60 Wash. 586, 111 Pac. 799, *Holly-Mason Hdw. Co. vs. National Surety Co.*, 107 Wash. 74, 180 Pac. 901.

Furthermore the court will find upon examination that in all of the cases in either of these two groups there was a specific finding as a basis for the lien that title had passed from the lien claim-

ant either to the owner of the liened premises or to the owner's contractor. Here, i.e., in the cases of Tacoma Millwork Supply Company and Washington Brick, Lime & Sewer Pipe Company, title never passed from the lien claimant.

Without attempting to group or classify the remaining cases cited from other jurisdictions, it may safely be said that they are distinguishable, and none constitutes an authority for the point sought to be made by these appellants.

In *Evans Marble Co. vs. International Trust Co.*, 6 Atl. 667, the lien claim of Bevan & Sons was allowed for work done away from the building on materials actually delivered to and incorporated into the structure. (See opinion p. 671.) The statement on page 72 of the Tacoma Millwork Supply Company's brief, as follows: "Delivery was not made", is contrary to the fact.

In *Emery vs. Hertig*, 61 N. W. 830, the sole question was whether a lien could be had where, when the work was done for which the lien was claimed, there was no knowledge or intent that the materials upon which the labor was being performed were to be incorporated in some particular building. The materials upon which the work was performed were actually used (see opinion p. 831) and the holding is merely that a specific intent that the material worked upon should be used in a particular building is not required to exist at the

time the work is done when from the nature of the work it is obvious that the materials are intended for use in some building.

In *Sheldon vs. Chicago, Building & Surety Co.*, 181 N. W. 282, the lien claimant had a contract similar to the material contract of the Tacoma Millwork Supply Company. About half of the material called for by this contract was delivered prior to the failure of the principal contractor. The balance of the material was delivered under a new contract with the owner and paid for. Upon the failure of the principal contractor the claim of lien was filed for "not only the mill work actually delivered prior thereto, but covered also millwork made up under the contract not yet delivered". The amount for which a lien was allowed was merely the value of the work actually delivered after deducting payments theretofore made. The sole contention was "that claimant is not entitled to a lien in any amount because it filed a lien for the full amount of the contract price at a time when it had performed less than half the contract." Under these circumstances the language quoted on page 67 of Tacoma Millwork Supply Company's brief and there characterized as a flat-footed holding, is dictum. It was recognized to be dictum by the Supreme Court of Iowa in the following language:

> "But as said, it is not necessary to expressly decide the point, since, even though claimant

did not come strictly within the rule above suggested, yet if it in good faith believed it did its right to a lien will not be defeated by reason of having made a mistake as to its legal rights in the absence of any showing of bad faith." (181 N. W. opinion sub. div. 4, pp. 290 to 291.)

In *Atlantic Terra Cotta Co. vs. Moore Const. Co.*, 80 S. E. 924, the Supreme Court of Appeals of West Virginia assumes the existence of certain exceptions to the general rule "that there can be no lien for material furnished a contractor, not used and incorporated in the building or structure". But without deciding the validity of any one of such exceptions, holds that the facts before it do not fall within any of them. (See opinion p. 926 and 927.)

In *Pittsburg Plate Glass Co. vs. Leary*, 126 N. W. 271, 31 L. R. A. N. S. 746, a lien was attempted to be established for plate glass broken in transit between the works of the lien claimant and the building. The lien was denied, following *Fuller & Co. vs. Ryan*, 44 Wash. 385, 87 Pac. 485. (See 31 L. R. A. N. S. at p. 758.)

Reference is also made to certain Pennsylvania cases, notably *Hinchman vs. Graham*, 2 Serg. & R., 170. The peculiarities of the statute and of the facts under and upon which that decision was made are clearly indicated in the annotations found in

31 L. R. A. N. S. at page 753, and L. R. A. 1915-E, at p. 306.

With respect to the case of *Thompson, McDonald Lbr. Vo. vs. Morawetz,* 149 N. W. 300, L. R. A. 1915-E 302, largely relied upon by appellants (see Tacoma Millwork Supply Company brief pp. 68 to 70) we call attention to the comment of the annotator found in the note appended to the report of said case in L. R. A. 1915-E at page 304, as follows:

> "It would therefore seem, in view of the further fact that the decision in *Thompson, McDonald Lumber Co. vs. Morawetz* is opposed by many decisions and fully supported by none, that the court may have gone a little further in sustaining the lien than other courts will be willing to go."

With respect to the cases of *Trammell vs. Mount,* 68 Texas 210, 4 S. W. 377, and *Berger vs. Turnblad,* 98 Minn. 163, 107 N. W. 543, we invite a comparison with *Baker vs. Yakima Valley Canal Co.,* 77 Wash. 70 137 Pac. 342.

To sum up the whole matter, we quote the conclusion reached by the annotator in the note in L. R. A. 1915-E at page 306:

> "On the whole, it would seem that when the legislature abandons the theory that a lien may be filed only for material used in the

building or for the benefit of the owner, it should in justice to all parties provide some basis for the lien, and that, in the absence of such a provision, the courts should assume that it did not intend to provide for a lien for material not actually employed upon the premises, in the absence of a delivery of the material upon the premises or other act equivalent thereto, as notice to or an implied assent by the owner."

Class or Rank of Lien

The Washington statute ranks or classifies the several liens allowed under the mechanics liens law in the following order of priority; first, laborers, second, material men, third, sub-contractors, and, fourth, the original contractor.

Counsel for these appellants admit that they are in the position of sub-contractors on the bank quarters contract. They claim they are materialmen as to the $65,000 or material contract, and that they are to be ranked as laborers with respect to the $30,000 or erection contract. They liken their position in this latter contract to that of E. E. Davis & Company, who had the contract for the erection of the steel (see appellants' brief p. 97). Yet E. E. Davis & Company was ranked by the lower court as a contractor, and has accepted that classification. It needs no reiteration of the

authorities cited to prove the correctness of the lower court's action with respect to the E. E. Davis & Company contract, and the Tacoma Millwork Supply Company's so-called erection contract is admittedly subject to the same rule.

As to the $65,000 or material contract, we might concede that if such contract stood alone it would entitle these appellants, if they were awarded a lien at all, to a materialman's lien. But that contract does not stand alone, since these appellants themselves in their pleadings and in their proof and at all times asserted that the three contracts were entered into as one and the same transaction, that each formed part of the consideration for the other. As Mr. R. T. Davis testifies (Tr. p. 701), "The two contracts designated as a material contract and erection contract are dated alike, and combined they provided for the installation in place of the interior millwork."

Amount of Lien

We take it to be self-evident that if any lien is allowed the amount thereof cannot exceed the contract price less the value of those items for which no claim is made, designated by the key letters "N. C.", on Exhibit 154. In addition certain other deductions must certainly be made, e. g. the items of anticipated profits and the item of bond premium. (See *Gray vs. Hickey*, 98 Wash. 278, 166 Pac. 625.)

Furthermore we believe it nearly as axiomatic that a deduction must likewise be made of the total value of the work which was incomplete when the building operations suspended. A court of equity would not decree that the Millwork Supply Company should complete the manufacture of such material. Specific performance is not decreed in such cases. While there is some testimony as to what it would cost to complete this work, there is none which will enable this court to say what the receiver of the Building Company would have to pay to have that work finished. It can not be said under the testimony submitted that the value of the building has been enhanced to the extent of $20 per door, the value assigned to them in their incomplete state, when the total value finished does not exceed $32.00, and for all the proof shows it might cost $20 or more per door to get someone to take on the job of completing their manufacture. Courts ought not to and will not indulge in such speculations. Hence since the value to the building of the unfinished material is the question to be decided, and since that value depends entirely upon the unknown quantity of what it would cost to finish, as compared with newly manufactured materials, there is no sufficient basis for determining the proper value to be assigned to this incomplete work. It must be thrown out entirely.

We submit therefore the subjoined tabulations of deductions which must be made from the con-

tract prices in determining the amount of any claim in case a lien is awarded. The figures are the same as submitted to the trial court, and are taken from the testimony of Mr. Lindstrom. The only criticism made of these figures so far as they relate to "N. C. materials" was that we did not allow credit on the values assigned for such work, as was actually done upon these materials and for wastage. However, since the item of wastage and that of the work done both enter into the value of the materials when complete, and since the appellants make no claim for these materials at all, it is impossible to see why the total value of the finished material should not be deducted. We heretofore supposed that a waiver of the whole was a waiver of each item comprised in the sum total.

The items in the following tabulation are taken from Exhibit 154, the prices from the Transcript, pp. 722 to 726. The court, however, will observe that certain minor items for which the appellants are making no claim are not included, so that actually the figures here given should be still further reduced, although only to a small extent.

Material contract, agreed price	$65,000.00
Door buck contract, Exh. B-1 to Exh. 154, Tr. pp. 769 and 773	1,266.00
Bank quarters contract, Exh. C-1 to Exh. 154, Tr. pp. 770 and 773	1,957.00
Extra work, Exh. E-1 and F-1 to Exh. 154, Tr. pp. 772 and 773	208.00
Total	$68,431.00

DEDUCTIONS

Profit claimed on balance of main (i.e. material) contract, Tr. p. 773		$ 1,000.00
Bond premium, Tr. p. 773		718.41
Miscellaneous deductions for no claim work, as follows:		
18,000 lin. ft. of base mold @ 10c		1,800.00
18,000 lin. ft. of base shoe @ 6c		1,080.00
19 pcs. 9′4″ mullion casing	190 lin. ft.	
451 pcs. 7′ mullion casing	3608 lin. ft.	
	3798 lin. ft. @ 35c	1,330.00
38 pcs. 9′ 4″ sub-jams	380 lin.ft.	
830 pcs. 6′10″ sub-jams	6640 lin ft.	
	7020 lin. ft. @ 20c	1,404.00
320 pcs. 9′8″ head sub-jams	3220 lin. ft.	
45 pcs. 9′2″ head sub-jams	450 lin. ft.	
28 pcs. 8′ head sub-jams	280 lin. ft.	
39 pcs. 4′4″ head sub-jams	234 lin. ft.	
	4184 lin. ft. @ 20c	836.80
450 doors at $32 (Cf. Tr. pp. 720, 726 and 769)		14,400.00
200 mahogany tramsom sash at $2.25 (Tr. p. 769)		500.00
		$23,069.21
Payments made		6,240.50
Total deductions		29,309.71
Total claims		$68,431.00
Total deductions		29,309.71
Total lienable, if any		$39,121.29

To this amount should or should not be added, depending upon the considerations heretofore ad-

vanced, the labor performed on the erection contract, to-wit, $6,043. (See Tr. p. 772.)

In view of this state of the record, the notice of lien upon which appellants rely having clearly included non-lienable items, which must have been known to be non-lienable, and the exact amount of the non-lienable items being indeterminable, the entire lien must fail. There was no request to amend by eliminating the non-lienable items, and it is and was settled law that profits are not lienable.

> "When an unspecified and indeterminable portion of the materials mentioned in the claim consists of non-lienable items which cannot be segregated from the general aggregate, the claim is of no effect."
>
> *Kerr on Mechanics Liens and Building Contracts*, Section 377.

> "It may be conceded that where some single non-lienable item, or even several, are mistakenly included in a claim of lien and such items can be readily segregated from those which are lienable, that such fact will not necessarily destroy claimant's right of lien; but when the commingling occurs in such manner that the court is unable to determine with certainty what are and what are not lienable items in the claim made, then the rule seems to be that the entire claim of lien is of no effect."

Gilbert Hunt Co. vs. Parry, 59 Wash. 646, at 650; 110 Pac. 541.

Conclusion

The receiver of the Building Company asks to join in this brief and to have it considered as submitted on his behalf as well.

We submit therefore that appellants' case is without equity, that no error was committed by the trial court to their prejudice, and that the appeal should be in all respects denied.

Respectfully submitted,

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